83 - 2067

No.

In The Supreme Court of the United States

October Term, 1984

TAMER MOURAD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. May a defendant convicted of conducting a continuing criminal enterprise in violation of 21 U.S.C. §848 and sentenced to a finite term of imprisonment thereunder also be punished for the substantive predicate Title 21 offenses comprising the §848 violation?

2. Must a trial court, when charging a jury about the "continuing series of violations" element of 21 U.S.C. §848, instruct the jury that those violations must be related?

LIST OF PARTIES

Petitioner Tamer Mourad, Joseph Hargrave and Adnan Yacteen were appellants in the United States Court of Appeals for the Second Circuit and co-defendants in the United States District Court for the Southern District of New York.*

*Three other defendants, Ghassan Saleh, Nawal Yacteen and Nemr Hazime were acquitted.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Tamer Mourad respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case which affirmed the judgment of conviction entered against him by the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the court of appeals is reported at 729 F.2d 195 (1984). It is set out in full in Appendix A, *infra*, pp. 1a-20a.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1984. Joseph Hargrave's Petition for Rehearing was denied by the Court of Appeals on April 18, 1984. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

The relevant provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title 21, United States Code, §801, *et seq.* are set forth in Appendix B, *infra*, pp. 21a-26a.

STATEMENT OF THE CASE

After an eight-week jury trial in the United States District Court for the Southern District of New York, petitioner Mourad was convicted of conducting a continuing criminal enterprise in violation of 21 U.S.C. §848 as well as of other related offenses involving the Comprehensive Drug Abuse Prevention and Control Act of 1970. 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 846, 952, 960, 963; 18 U.S.C. §1952. The core of the government's case against Mourad rested upon the testimony of four informant witnesses, each of whom was convicted of narcotics violations and testified for the government with expectations of leniency. Other significant evidence consisted of contraband, documents and other items seized from Mourad's home, as well as cash.

Under the aegis of Title 21, Mourad, a first-time offender, was subjected to a sentencing scheme that was both elaborate and severe. The sentences imposed under the several counts were divided into four groups by the district court.*

"Group A" consisted only of the §848 violation. On this count, Mourad was sentenced to a 40-year

* A chart of the sentences devised by the Second Circuit, *United States v. Mourad, supra*, 729 F.2d at 203, n.15, is set forth separately as Appendix C; p. 27a.

term of imprisonment and a fine of $50,000.

"Group B" consisted of those counts charging conspiracy to import heroin (Count 2) and three substantive importation violations (Counts 4, 7 and 10).* The sentences imposed on the counts in Group B were consecutive to each other for a total of 45 years' imprisonment.

"Group C" consisted of those counts charging conspiracy to distribute heroin (Count 1) and three substantive distribution violations (Counts 5, 8 and 11). Similarly, these were declared to be consecutive to each other for a total of 45 years' imprisonment.**

"Group D" consisted of those counts charging Travel Act offenses in violation of 18 U.S.C. §§1952 and 2 (Counts 6, 9, 13, and 15). Here, too, the sentences imposed on each of the counts were consecutive to each other for a total of 20 years' imprisonment.

As noted, sentences imposed on counts within each group were consecutive to each other. Each group was to be served concurrently with all others. Accordingly, the total sentence imposed for the conspiracy and substantive Title 21 violations totalled 45 years and thereby exceeded the sentence imposed on the §848 charge by five years. On appeal to the Second Circuit, it was petitioner's position, *inter alia*, that if the §848 conviction was upheld, the convictions on all counts charging violations of Title 21, United States Code, must be vacated as lesser included offenses.

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* On the conspiracy count of this group and on Count 4, Mourad was fined $25,000 each.

** Additionally, a term of special lifetime parole was imposed on each of the substantive counts.

This was not the only appellate issue concerning the §848 conviction. Another concerned the failure of the district court to charge an element of the offense. Specifically, with regard to the element of "relatedness" as it applies to the "continuing series of violations" that constitute the predicate for a §848 offense, the petitioner requested that the trial court follow the charge approved by the Second Circuit in *United States v. Sperling*, 506 F.2d 1323 (2d Cir.) *cert. denied*, 420 U.S. 962 (1975).* That instruction would have addressed the issue by requiring the jury to convict of three substantive offenses charged in the indictment and by the following language:

> In this regard, it would be insufficient to support a conviction on this count if all you were to determine was that Mr. Mourad simply sold heroin to people on a haphazard basis.

The district court rejected this request to charge.** Instead, the trial court spoke in terms of the jury being able to "use [its] understanding of the meaning of plain English words and determine whether there was a continuing series of violations." Timely objection was taken (Tr. 4735-36, 4796-97).

Other than the government's listing of twelve transactions during its summation, which included the acts underlying the substantive offenses charged in the indictment, there was no other specification of

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* The entire request to charge is reproduced as Appendix D; pp. 28a-31a.

** Pages 4733-36 and 4796-97 of the transcript reflecting pertinent portions of the district court's charge are reproduced as Appendix E; pp. 32a-37a.

what the other substantive offenses might be. Nor did the district court identify what offenses might have been committed in each of those transactions and key in appropriate instructions. The element of "relatedness" was never mentioned. On appeal, it was petitioner's position that the deficiency of the charge in this regard constituted "plain error" and that the effect was to relieve the government from establishing each element of the §848 violation beyond a reasonable doubt.

With regard to petitioner's sentencing claim that the Title 21 violations merged with the §848 conviction as lesser-included offenses, the Second Circuit vacated only the sentences on the conspiracy counts and rendered an opinion that was at once at odds with three circuit courts of appeal in the result it reached and inconsistent with three other circuits in its approach.

With regard to petitioner's claim concerning the sufficiency of the charge on the §848 count, the Second Circuit subsumed it by writing: "We have carefully considered all other claims of error raised by appellants and we find them to be without any merit whatsoever." *United States v. Mourad, supra,* 729 F.2d at 204.

REASONS FOR GRANTING THE PETITION

1. The conflict among the circuits in attempting to resolve the issue of cumulative punishment under §848—an important and increasingly utilized federal criminal statute—warrants an interpretation by this Court.

The sentencing question presented in this case raises an important and vexatious issue which has

produced considerable conflict among the circuits.

In attempting to resolve the confusion surrounding whether there can be cumulative punishment of a defendant for conspiracy and substantive offenses that serve as the predicates for a conviction of the continuing criminal enterprise outlawed by §848, some circuits have based their analyses in terms of whether the predicate felony offenses constitute lesser included offenses of the "continuing criminal enterprise." Other circuits have analyzed the issue by focusing upon the congressional intent to provide for cumulative punishments.

Although this Court in *Jeffers v. United States*, 432 U.S. 137 (1977) has dealt with the problems presented by convictions for conspiracy and a continuing criminal enterprise in violation of §848, it has not directly addressed the issue of whether substantive Title 21 violations merge with the §848 offense. Moreover, as noted by the Second Circuit below in this case, "*Jeffers* has been the subject of a number of differing interpretations." *United States v. Mourad*, *supra*, 729 F.2d at 202.

Indeed, the Second Circuit, in *Mourad*, observed that it had to reverse its field at least once because of *Jeffers*. Specifically, the Second Circuit stated that it had previously held in *United States v. Sperling*, 560 F.2d 1050 (2d Cir. 1977), that a §846 conspiracy was a lesser included offense of a §848 violation. *United States v. Mourad*, *supra*, 729 F.2d at 202. It noted that "*Jeffers* relied on a multiple punishment analysis and an examination of congressional intent." *Id.* at 203. Moreover, the *Mourad* panel commented that:

> The Supreme Court expressly declined to settle "definitively" the issue as to whether §846 was a lesser included offense of §848. Rather, the Court relied upon an assumption that arguendo §848 required agreement between co-conspirators. [citation and footnotes omitted.]

Id. at 202.

Significantly, the *Mourad* panel also commented upon the "ambiguity" of *Jeffers* in the following language:

> Although the Court in *Jeffers* concluded that Congress did not sanction cumulative punishment for violations of §846 and §848, there is some ambiguity about the extent of its holding with respect to Congressional intent concerning other substantive and conspiracy offenses included in the act [footnote omitted]. Some language seems to support an interpretation that *all* offenses merge with a §848 conviction. [emphasis as in original].

Id. at 203. This was and is petitioner's precise position.

The facts of *Jeffers* and the diversity of the opinions therein allowed the Second Circuit to interpret the *Jeffers* holding quite narrowly: that "a defendant found guilty of both a conspiracy and a continuing criminal enterprise violation may not be fined more than the maximum authorized by §848." *Id.* at 202. Resting upon this restrictive interpretation, the Second Circuit acknowledged in *Mourad* that Congress did not intend to authorize cumulative punishment for §848 and conspiracy convictions under Title 21 and vacated the conspiracy sentences. But it then went on to declare that:

> A reading of Justice Blackmun's plurality opinion in *Jeffers* leads us to conclude that only cumulative punishment for conspiracy violations is prohibited and that cumulative punishment for substantive offenses and a continuing criminal enterprise under §848 does not violate the Double Jeopardy Clause.

Id. at 203.

This decision is in direct conflict with those in three other circuits. In *United States v. Gomberg*, 715 F.2d 843 (1983), the Third Circuit held that a defendant sentenced under §848 for engaging in a continuing criminal enterprise should not also receive separate sentences for the underlying conspiracies and substantive offenses. The Seventh Circuit, in *United States v. Jefferson*, 714 F.2d 689 (1983), has also decided that cumulative sentences may not be imposed upon the predicate Title 21 felonies supporting a §848 conviction. Finally, in this regard, the Fifth Circuit has held in *United States v. Chagra*, 669 F.2d 241 (1982), that it was error to impose cumulative fines for Title 21 possessory offenses and §848 violations.

Ironically, though the Second Circuit in *Mourad* reached a different result than did the Third, Fifth, and Seventh Circuits in *Gomberg*, *Chagra* and *Jefferson*, respectively, its approach comported with those circuits in that it focused upon whether cumulative punishment was prohibited by congressional intent and eschewed a lesser included offense analysis. But this only compounds the disarray among the circuits. In contrast, three other circuits have relied upon *Blockburger v. United States*, 284 U.S. 299 (1932) and its traditional lesser included offense-double jeopardy analysis. Specifically, the Eighth Circuit in *United*

States v. Samuelson, 697 F.2d 255 (8th Cir. 1983), the Ninth Circuit in *United States v. Smith*, 690 F.2d 748 (9th Cir. 1982), and the Eleventh Circuit in *United States v. Graziano*, 710 F.2d 691 (11th Cir. 1983), have each held that the predicate conspiracies underlying a continuing criminal enterprise conviction are *lesser-included offenses.*

This schism is underscored by the fact that *Samuelson*, *Smith* and *Graziano* each post-date this Court's opinion in *Jeffers*. Thus, each reflects the view that the "lesser included offense analysis" still has vitality. This is a critical distinction. For, in those cases in which the lesser-included offense analysis was utilized, the convictions were vacated.* In contrast, however, in those cases in which congressional intent governing cumulative punishment was the determining factor, only the sentences have been vacated and the convictions were left standing.** Despite the draconian sentences involved, this is no academic distinction. For, as the Second Circuit has noted, there are "collateral consequences" of a conviction and if there is an improper conviction for a lesser included offense, the proper remedy is to vacate the conviction and not only the sentence. *United States v. Slutsky*, 487 F.2d 832, 845-46 n.18 (2d Cir. 1973).

Finally, we observe that the Second Circuit in *Mourad*—wholly unlike the Third Circuit in *Gomberg*—has read *Jeffers* too narrowly by relying simply on the congressional intent concerning cumulative punishment and never reaching the lesser

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* *United States v. Samuelson*, 697 F.2d 255 (8th Cir. 1983); *United States v. Smith*, 690 F.2d 748 (9th Cir. 1982); *United States v. Graziano*, 710 F.2d 691 (11th Cir. 1983).

***United States v. Gomberg*, 715 F.2d 843 (3d Cir. 1983); *United States v. Jefferson*, 714 F.2d 689 (1983); *United States v. Chagra*, 669 F.2d 241 (5th Cir. 1982).

included offense issue. In *Jeffers*, Justice Blackmun, writing for the plurality, acknowledged that the comprehensive sentencing structure of the Comprehensive Drug Abuse Prevention and Control Act of 1970 left "little opportunity for pyramiding of penalties." *Jeffers v. United States, supra*, 432 U.S. at 156. Similarly, Justice Blackmun noted that "since every §848 violation by definition also will involve a series of other felony violations of the Act . . . there would have been no point in specifying maximum fines for the §848 violation if cumulative punishment was to be permitted." *Ibid.*

The Second Circuit expressly focused upon Justice Blackmun's opinion, *United States v. Mourad, supra*, 729 F.2d at 203, but, in our view misread it. As we see it, the guidelines posted by Justice Blackmun are clear and petitioner's contention that all the Title 21 violations are lesser included offenses is correct.

Clarification is certainly needed. No less than seven circuit courts of appeals are in disarray to some degree on this issue and the significance—indeed, the urgency—of resolving it cannot be overstated. For, as this Court acknowledged in *United States v. Whelan*, 445 U.S. 684 (1980):

> If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty.

2. The Second Circuit's tacit approval of the trial court's failure to define or explain "relatedness" as it

applies to a §848 violation effectively removes that element from the offense and is in conflict with the Fifth and Sixth Circuits. The continuing criminal enterprise offense is an important and aggressively used federal criminal statute which warrants clear definition by this Court.

One element of the continuing criminal enterprise offense is that there has to be "a continuing series of violations." 21 U.S.C. §848. The court's charge to the jury in this regard was:

> Now, the second element is, if you find that, you have to find in order to convict that this violation was part of a continuing series of violations of the federal statutory provisions making it a crime to import heroin or distribute heroin or possess heroin with intent to distribute or attempt or aid and abet any such activity. You see at the bottom of page 5 the phrase "which violations were part of a continuing series of violations." So that's listed in the indictment . . .
>
> * * *
>
> Now what's meant by a continuing series of violations? It must obviously be more than one. I instruct you that it must be at least three. Aside from that requirement it is up to you to use your understanding of the meaning of plain English words and determine whether there was a continuing series of violations. (Tr. 4734-35).*

In our view, this was an abject failure to charge the judicially required element that the three violations be related to each other.

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* Pages 4733-36 and 4796-97 of the transcript, reflecting the pertinent portions of the district court's charge, are reproduced as Appendix E; pp.

The earliest reported decision dealing with the term "series" as it is used in this statute appears to be *United States v. Collier*, 358 F. Supp. 1351, 1355 (E.D. Mich. 1973) *aff'd*, 493 F.2d 327 (6th Cir. 1974). Relying upon dictionary definitions and an interpretation of a civil statute by the Supreme Court of Oregon, the *Collier* court held that the term "would seem . . . to mean three or more related acts . . . ." The court concluded that "the term 'continuing series' is not so vague that a person is not sufficiently warned of the consequence of his conduct nor is it so vague that the judge and jury will be unable to apply that term to defendant's conduct." *Id.* The defendant's claim that the statute was unconstitutionally vague was thus rejected.

Subsequent reported decisions dealing with the definition of the term "series" in both the Fifth and Sixth Circuits have required a jury finding, on this element, of at least three *related* violations. *See e.g., United States v. Phillips*, 664 F.2d 971, 1013 (5th Cir. 1981); *United States v. Johnson*, 575 F.2d 1347, 1357 (5th Cir. 1978); *United States v. Fry*, 413 F. Supp. 1269, 1272 (E.D. Mich. 1976), *aff'd*, 559 F.2d 1221 (6th Cir. 1977); *United States v. Bergdoll*, 412 F. Supp. 1308, 1317 (D. Del. 1976).

While this statute and its terms have been upheld against void for vagueness challenges, *see, e.g., United States v. Manfredi*, 488 F.2d 588, 602-03 (2d Cir. 1973); *United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974); and *United States v. Sisca*, 503 F.2d 1337, 1345 (2d Cir. 1974), the operative rationale for such analyses has been that the defendant's challenged conduct, and attendant criminal intent, drew him well within the scope of the reasonable and fair meaning of the statute and thus provided him with ample notice of the criminal nature of the conduct in which

he was engaged. Cf. *United States v. Mazurie*, 419 U.S. 544 (1975).

This approach, however, is not dispositive of whether or not the jury in this case received proper guidance regarding this significant element of the offense. Petitioner Mourad's requests to charge in this regard, which were not granted by the district court, attempted to focus upon the element of relatedness by asking the court to charge the jury that "it would be insufficient to support a conviction on this count if all you were to determine was that Mr. Mourad simply sold heroin to other people on a haphazard basis." Appendix D; p. 30a. In our view, this constituted an abject failure to charge an element of the offense and constitutes plain error. Indeed, the Second Circuit held in *United States v. Natale*, 526 F.2d 1160, 1167 (2d Cir. 1975), that:

> failure to charge each separate element of an offense may be plain error. Such "errors go directly to a defendant's right to have the jury told what crimes he is actually being tried for and what the essential elements of those crimes are." . . . Failure to charge each element of the offense may be reversible error even where the elements not charged have been wholly uncontested by the defendant. . . . The plea of not guilty places every issue in doubt and not even undisputed fact may be removed from the jury's consideration, either by direction or by omission in the charge. [citations omitted].

A failure to define operative terms of the elements of the offense is equally significant. In *United States v. Gillilan*, 288 F.2d 796, 797 (2d Cir. 1961), Judge Learned Hand was confronted with a circumstance similar to the one here. The defendant had been indicted on a conspiracy count providing liability if the

defendant "were in the active discharge of his duties, if he 'represents any person in the sale of anything to the government through the department in whose service he holds a retired status.' " In that case, the trial court did not define "representation" for sale. In the opinion of the Second Circuit, such a definition was necessary. Notwithstanding that the *Gillilan* court could not conclude that the defendant had not in fact "represented" his prior service, it found reversible error because the jury was left without instruction as to the legal definition of "representation." *Accord, United States v. Anderton*, 629 F.2d 1044 (5th Cir. 1980).

While it has been held in the "straightforward context" of *United States v. Johnson*, 575 F.2d 1347, 1357-58 (5th Cir. 1978), that certain terms of §848 did not require definition in jury instructions, the term "series" here and its attendant requirement of a finding of relatedness of the offenses certainly required explication. Indeed, all of the courts of appeals have been compelled to interpret the word "series" in interpreting Rule 8(b) of the Federal Rules of Criminal Procedure (joinder of defendants) which utilizes the phrase "series of acts or transactions constituting an offense or offenses." All have focused upon the requisite nexus of a common scheme or plan ("relatedness"), *e.g., United States v. Bernstein*, 533 F.2d 775 (2d Cir. 1976), and upon the inadequacy of, for example, mere similarity of offenses, *e.g., United States v. Jackson*, 562 F.2d 789 (D.C. Cir. 1977), or a common time frame, *United States v. Satterfield*, 548 F.2d 1341 (9th Cir. 1977). Surely, if the scope of the same word has necessitated repeated judicial interpretation—for prosecutors, defense attorneys and

trial judges alike—the trial court could not leave the jury to its own devices in the same area of analysis.

The ramifications of this error are better appreciated upon considering the fact that the Court refused Mourad's request to charge the jury that they had to find Mourad guilty of three substantive Title 21 violations as charged in the indictment as a predicate for this element.* This was predicated upon the charge approved by the Second Circuit in *United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975), and would have alleviated the problem by relying upon the indictment itself as providing an adequate nexus to establish the necessary "relatedness." Instead, the court charged:

> The word "violations" refer to the substantive offenses of procuring the importation of heroin, attempting to possess heroin with intent to distribute, possessing heroin with intent to distribute or distributing heroin, the kinds of things we have talked about in the earlier part of the charge. Those are the substantive offenses under the statute. Those would be violations within the meaning of this language. And by now you know what it is to commit each of those crimes, you know what it takes to commit those crimes.
>
> Now, in considering whether Mourad was guilty of a continuing series of violations, you will consider all the evidence in the case, not just the evidence about the substantive counts in the indictment. In other words, in connection with this requirement of continuing series you consider all the evidence, not just the evidence underlying particular substantive counts. In

*Appendix E; pp. 32a-37a.

other words, you will consider all the evidence in the case, that is, the evidence relating to the substantive counts I enumerated and also all the other evidence, and determine whether Mourad was guilty of a continuing series of violations of the kind I have defined to you. It's up to you to consider all the evidence and determine whether that element is proved. (Tr. 4735-36). Appendix E; p. 34a.

Other than the government's listing of twelve transactions during its summation, which included the acts underlying the substantive offenses charged in the indictment, there was no other specification of what the other substantive offenses might be. Thus, the court totally failed to give the jury appropriate instructions that the three violations constituting the series have to be related one to another and thereby eliminated an element from the offense which other circuits have required.

CONCLUSION

THE PETTION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED

Respectfully submitted,

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June, 1984

APPENDIX A

UNITED STATES of America, Appellee,

v.

Tamer Trad MOURAD, Joseph Hargrave, and Adnan Yacteen, Defendants-Appellants.

Nos. 445-447, Dockets 83-1194, 83-1197 and 83-1198.

United States Court of Appeals, Second Circuit.

Argued Dec. 6, 1983.

Decided Feb. 24, 1984.

Carl M. Bornstein, New York City (Jacob Laufer and Bornstein & Laufer, New York City, on brief), for defendant-appellant Mourad.

Irving Anolik, New York City, for defendant-appellant Hargrave.

William P. O'Neill, Springfield, Mass. (Matroni, Dimauro, Fitzgerald & Sweeney, Springfield, Mass., on brief), for defendant-appellant Yacteen.

Paul Schectman, Asst. U.S. Atty., New York City (Rudolph W. Giuliani, U.S. Atty., Janette P. Patterson, Andrew J. Lavender and Barry A. Bohrer, Asst. U.S. Attys., New York City, on brief), for appellee.

Before TIMBERS, VAN GRAAFEILAND and NEWMAN, Circuit Judges.

TIMBERS, Circuit Judge.

Appellants Mourad, Hargrave and Yacteen appeal from judgments entered May 18, 1983 in the Southern District of New York, Thomas P. Griesa, *District Judge,* after an eight week jury trial, convicting them of violations of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (the Act), and related offenses.

Specifically, appellants were convicted of the following offenses: all appellants of conspiring to import heroin, 21 U.S.C. §963 (1982), and conspiring to distribute heroin, 21 U.S.C. §846 (1982); appellant Mourad of organizing a continuing criminal enterprise, 21 U.S.C. §848 (1982); all appellants of various substantive violations of the narcotics laws for importing and distributing heroin, 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 952, 960 (1982); appellants Mourad and Yacteen of interstate travel to facilitate the distribution of heroin, 18 U.S.C. §1952(1982); and all appellants of using interstate facilities to promote the distribution of heroin, 18 U.S.C. §1952 (1982).

For the reasons stated below, we affirm the convictions of all appellants on all counts; and we remand the case of Mourad to the district court solely for the purpose of reconsideration of his sentence in accordance with our opinion herein.

I.

FACTS AND PRIOR PROCEEDINGS

During the course of the eight week trial a great deal of evidence was adduced which resulted from a five month investigation by the Drug Enforcement Administration (DEA). We shall summarize only so

much of the evidence as we believe necessary to an understanding of our rulings on the legal issues raised on appeal. There was evidence from which the jury could have found as follows.

The evidence included the testimony of four accomplice witnesses, evidence of physical surveillances, evidence of the fruit of various searches, and proof of unexplained wealth. Such evidence permitted the jury to find that appellants were high ranking figures in an international narcotics smuggling operation that transported a continuous flow of large quantities of heroin from Lebanon to the United States over a four year period.

Mourad, a Lebanese national, directed the movement of heroin into the United States from Lebanon. Yacteen, who was Mourad's chief assistant, helped transport and safeguard the enterprise's heroin. Hargrave supervised the distribution network in the New York area.

The smuggling operation began in 1979 when Mourad and Hargrave travelled to Lebanon to meet with a heroin refiner. On that trip they were introduced to a former Lebanese customs official, Mohamed Berro, who agreed to help them covertly transport heroin to the United States. Berro agreed with Mourad and Hargrave that a dummy corporation should be set up, with offices in New York City and Beirut, to act as a cover for the frequent traveling which would be necessary. Nassif Berro, the son of this former customs official, was one of the government's chief witnesses at trial. He was present at the initial negotiations and later picked up the first shipment of heroin for delivery to his father, who arranged

for shipment to Mourad and Hargrave in New York. An airline pilot acted as courier and delivered the heroin to Mourad.

Several weeks after delivery of the first shipment, a second purchase of heroin was made from the same refiner. Again, Berro, Sr. arranged to have a courier deliver the heroin to a relative of Mourad in Los Angeles. Berro, Sr. was paid about $90,000 for his help.

Hargrave and Mourad again travelled to Lebanon in the spring of 1980. They contacted Mourad's longtime friend, Mahmoud Yaghi, who later testified for the government. He arranged for a villa for Hargrave, Mourad and their friends. He also introduced Hargrave and Mourad to a Lebanese banker, to whom Hargrave gave $200,000 while Yaghi watched. Yaghi introduced them to a new heroin supplier, Hargrave having expressed dissatisfaction with the quality of the heroin supplied earlier. Hargrave and Mourad engaged Yaghi to transport some of the new heroin to New York. While in New York, Yaghi witnessed two heroin transactions involving Hargrave and Mourad.

In April 1981, Mourad and Yacteen travelled to Lebanon. Again Yaghi was engaged to arrange for delivery of a new shipment of heroin. He and another courier delivered it personally. Both Yaghi and the courier later were arrested in New York by DEA agents.

In October 1981, another shipment was intercepted when another Lebanese courier was arrested

while claiming his luggage in New York. This courier, Emil Ghazali, also later testified for the government.

Additional shipments from Lebanon to the United States took place in February, March and June of 1982. Berro's son was arrested in New York City while attempting to sell the June delivery to an undercover agent. Two days later, Hargrave was arrested on an indictment returned in the District of New Jersey for income tax evasion. At the time of his arrest he placed a telephone call to his wife in the presence of government agents. During this telephone conversation, he made incriminating statements in code. Later, while imprisoned in the same facility as Berro, Hargrave made a number of incriminating statements to Berro.

On November 7, 1982, DEA agents executed search warrants at the homes of Mourad and Yacteen in Agawam and East Long Meadow, Massachusetts. The search of Mourad's home resulted in the seizure of a pound of unrefined heroin; quantities and traces of mannitol, a heroin dilutant; glassine envelopes; hashish and marijuana; $26,000 in cash; and a narcotics ledger written in Arabic. The search of Yacteen's home resulted in the seizure of a false-bottomed suitcase containing traces of heroin; a triple beam scale; mini-scales; a heat sealer; glassine bags; hollow-point bullets; a .357 Magnum handgun; $10,000 in cash; and financial records concerning Yacteen's narcotics trafficking. The agents also seized the telephone books of Mourad and Yacteen which contained the telephone numbers of their co-conspirators.

Mourad and Yacteen subsequently were arrested and confined at the Franklin House of Detention in Massachusetts. There they made a number of in-

criminating statements to a fellow prisoner who later testified for the government.

On January 4, 1983, appellants Mourad, Hargrave and Yacteen were indicted, in the instant case, along with Jamil Hameiah, Ghassan Saleh, Nawal Yacteen and Nemr Hazime. Trial began on February 7, 1983 and was concluded on April 4, 1983. Mourad, Yacteen, and Hargrave were convicted of various charges set forth in the margin.[1] Saleh, Hazime, and Nawal Yacteen were acquitted. Hameiah remains a fugitive. On May 18, 1983, the court sentenced Mourad to a total of 45 years imprisonment and a $100,000 fine; Hargrave to a total of 45 years imprisonment and a $120,000 fine;[2] and Yacteen to 15 years imprisonment as a young adult offender pursuant to 18 U.S.C. §4216 (1982). From their judgments of conviction, appellants have taken the instant appeals.

Of the various claims of error raised on appeal, we rule as follows on what we find to be the essential ones: (1) appellants were not denied a fair trial by alleged prosecutorial misconduct; (2) disappearance of a witness did not prejudice appellants; (3) the court's evidentiary rulings which are challenged were correct, and (4) since the narcotics conspiracy conviction of appellant Mourad merged with his continuing criminal enterprise conviction, his case is remanded solely for the purpose of reconsideration of his sentence.

We shall discuss seriatim our rulings stated above.

II.

ALLEGED PROSECUTORIAL MISCONDUCT

Appellants contend that their convictions should be reversed because of alleged prosecutorial misconduct. Their chief argument is that the defense was placed at a disadvantage because production of material required by 18 U.S.C. §3500 (1982) (the Jencks Act), Fed.R.Crim.P. 16, and *Brady v. Maryland*, 373 U.S. 83 (1963), was delayed. Appellants claim that they therefore were unable to use such material effectively.

In *Brady*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

It is true that some material was not promptly turned over to counsel for appellants.[3] We believe, however, that there are at least two reasons why such prosecutorial conduct does not warrant reversal. First, production of the evidence was delayed, not suppressed.[4] Appellants had several possible remedies at various times of which they chose not to avail themselves, such as requesting a continuance, recalling the witness for further examination, or introducing rebuttal evidence. Second, there had been no showing that the delay resulted in any prejudice, or even that the evidence was material to the issue of guilt. The trial judge carefully scrutinized the possibility of prosecutorial misconduct and discovery abuse. Indeed, he struck the testimony of one witness

when the government inadvertently failed to produce one of the witness's reports. In *United States v. Sperling*, __F.2d__, slip op. 1193 (2 Cir. Jan. 20, 1984), we recently considered a case where a tape which contained impeaching evidence was not produced by the government until after the trial. We affirmed the conviction because there was no likelihood that the lack of evidence reasonable could have affected the verdict. __F.2d at __slip op. at 1201. A similar conclusion is inescapable in the instant case where appellants have failed to show any prejudice whatsoever.

We hold that appellants' claim of alleged prosecutorial misconduct is without merit.[5]

III.
DISAPPEARANCE OF A WITNESS

Yaghi was called as a witness by the government on February 22, 1983. Cross-examination began that afternoon. By the end of February 23, counsel for appellants had completed their cross-examination of him.

On the morning of February 24, the government belatedly produced the minutes of Yaghi's sentencing hearing which disclosed that he had lied to the sentencing judge. To eliminate the possibility of prejudice, the court postponed further cross-examination until that afternoon to allow defense counsel to examine this important impeachment evidence. Counsel for one of the defendants not involved on this appeal fully cross-examined Yaghi on the sentencing minutes, as well as on Yaghi's conversation with a defense investigator in which Yaghi supposedly confessed to having falsely implicated the defendant. By the end of

February 24, each of appellants' counsel, except counsel for Mourad, had had an opportunity to re-open his cross-examination of Yaghi concerning the sentencing minutes.

On February 25, Yaghi failed to return for completion of his testimony. The court, noting that virtually all cross-examination had been completed, indicated that it would not grant any motion for a mistrial, nor would it strike Yaghi's testimony. On March 10, the government stated that it still had not been able to locate Yaghi. The court thereupon permitted defense counsel to introduce, in the presence of the jury, evidence of Yaghi's flight. A substantial portion of the defense case was devoted to that issue and to other attacks on Yaghi's credibility.

Under these circumstances, appellants' claims—pressed especially by Hargrave—that they were denied a complete right to confrontation of the witness Yaghi are without merit. As for Hargrave, prior to Yaghi's disappearance Hargrave had completed his cross-examination; he had been permitted to re-open his cross-examination; and he had stated expressly that he had no further questions to ask.

During cross-examination of Yaghi, defense counsel had elicited that he had committed a revenge murder in Lebanon and that that murder had occurred in a courtroom; that he had lied to DEA agents at the time of his arrest; that his defense at his own trial was a sham; that he had lied to a grand jury in New Jersey; and that he had written letters to Hargrave and Mourad in which he solicited substantial sums of money and threatened otherwise to be "on the side of the government."

In this context, we find reasonable the court's finding that it was the government that had been chiefly prejudiced by Yaghi's disappearance, since the government had been denied the opportunity to rehabilitate its witness. Moreover, the evidence of Yaghi's flight had been fully disclosed to the jury, enabling them to draw their own conclusions.

Mourad's argument with respect to Yaghi focuses upon his claim that he was denied the right to question a defense investigator about Yaghi's statement to the investigator that Yaghi was being pressured by the government agents to testify and that he would tell them anything unless one or more of the defendants paid him money. Mourad contends that the investigator's testimony was relevant to Yaghi's bias. The court excluded the testimony on the ground that it was extrinsic evidence of bias which was inadmissible because Yaghi was not available to explain or deny the statements attributed to him as required by Fed.R.Evid. 613(b). We believe that the court's ruling in this respect was not prejudicial to appellants in view of similar evidence already before the jury, e.g., Yaghi's letters to Mourad and Hargrave demanding money and threatening to testify for the government if he did not receive the money.

We hold that appellants were not prejudiced by the disappearance of the witness Yaghi and that the court's rulings with respect thereto, including the exclusion of the testimony of the investigator, were not erroneous.

IV.
EVIDENTIARY RULINGS
(A)

The search of Yacteen's home resulted in the seizure of a .357 Magnum handgun which was admitted in evidence against all appellants.

Hargrave contends that its admission against him constitutes reversible error. Physical evidence found in the home of one conspirator is admissible against all conspirators to show the evidence of the conspiracy. *United States v. Praetorius*, 622 F.2d 1054, 1063 (2 Cir.1979), *cert. denied*, 449 U.S. 860 (1980). Guns constitute important evidence of a narcotics conspiracy. "[S]ubstantial dealers in narcotics keep firearms on their premises as tools of the trade almost to the same extent as they keep scales, glassine bags, cutting equipment and other narcotics equipment." *United States v. Wiener*, 534 F.2d 15, 18 (2 Cir.), *cert. denied*, 429 U.S. 820 (1976). The admission of Yacteen's gun was significant evidence probative of the scope of the conspiracy as to all appellants.

Hargrave challenges the admission against him of three small bags of hashish found in Mourad's home. While it is not clear from the record whether this evidence was relevant to the heroin conspiracy, its admission could hardly have resulted in significant prejudice. In the context of the evidence of kilograms of high-purity heroin, it is unlikely that this small quantity of hashish found in Mourad's home could have prejudiced Hargrave.

(B)

Hargrave contends that the court improperly admitted the testimony of two DEA agents regarding incriminating statements he made in their presence during a telephone call to his wife at the time of his arrest.[6] We find no merit in Hargrave's claim that this evidence violated his Sixth Amendment rights.[7]

The relevant inquiry with respect to this type of claim under the Sixth Amendment is "whether the Government has interfered with the right to counsel of the accused by 'deliberately eliciting incriminating statements." *United States v. Henry*, 447 U.S. 264, 272 (1980). The record before us does not show any such deliberate attempt to elicit evidence. The agents merely told Hargrave that he could use the telephone. They did not suggest that he call any particular person nor did they propose topics of conversation. And there is no indication that offering Hargrave the telephone was a ploy "designed to elicit an incriminating response." *United States v. Guido*, 704 F.2d 675, 677 (2 Cir. 1983), quoting *Rhode Island v. Innis*, 446 U.S. 291, 302 n. 7 (1980). We find that the statements made by Hargrave during the telephone conversation were not illegally obtained by the agents and that they were properly admitted in evidence.

We hold that no error was committed by the court in the challenged evidentiary rulings.

V.

MERGER OF CONSPIRACY AND CONTINUING CRIMINAL ENTERPRISE CONVICTIONS

Mourad contends that the sentences imposed on him for all Title 21 convictions except his §848 conviction, see note 15, *infra*, violate the double jeopardy clause of the Fifth Amendment by subjecting him to punishment for lesser included offenses which merged with the continuing criminal enterprise conviction under §848.[8] We hold that Congress did not intend to authorize cumulative punishment for conspiracy and continuing criminal enterprise convictions under the Act. We therefore vacate the sentences imposed on Mourad on the conspiracy counts and remand his case solely for the purpose of reconsideration of his §848 sentence.

The Supreme Court in *Jeffers v. United States*, 432 U.S. 137 (1977) (plurality opinion), first dealt with the problem presented by convictions for conspiracy and a continuing criminal enterprise in violation of §848.[9] *Jeffers* has been the subject of a number of differing interpretations.[10] We read the actual holding narrowly: a defendant found guilty of both a conspiracy and a continuing criminal enterprise may not be fined more than the maximum authorized by §848. *United States v. Gomberg*, 715 F.2d 843, 849 (3 Cir. 1983). The Supreme Court expressly declined to settle "definitively" the issue as to whether §846 was a lesser included offense of §848.[11] Rather, the Court relied upon an assumption that arguendo §848 required agreement between co-conspirators. 432 U.S. at 149, 153 n. 20, 155.

Instead of finding §846 to be a lesser included offense of §848, as we have previously held, *United States v. Sperling*, 560 F.2d 1050, 1060 (2 Cir. 1977), the Court in *Jeffers* relied on a multiple punishment analysis[12] and an examination of Congressional intent. The Fifth Amendment protects against multiple punishments for the same offense. *North Carolina v. Pearce, supra* note 12, 395 U.S. at 717; *Whalen v. United States, supra* note 9, 445 U.S. at 689. Considering the double jeopardy implications of multiple punishments imposed in a single criminal proceeding, the Court in *Whalen* held that the federal courts were precluded from imposing consecutive sentences unless authorized by Congress. Statutory construction thus serves as the basis for resolving a multiple punishment double jeopardy claim. *Missouri v. Hunter*, __U.S.__ (1983); *Albernaz v. United States*, 450 U.S. 333 (1981); *United States v. Marrale*, 695 F.2d 658, 662 (2 Cir. 1982), *cert. denied*, __U.S.__ (1983).

Although the Court in *Jeffers* concluded that Congress did not sanction cumulative punishment for violations of §846 and §848, there is some ambiguity about the extent of its holding with respect to Congressional intent concerning other substantive and conspiracy offenses included in the Act.[13] Some language seems to support an interpretation that *all* offenses merge with a §848 conviction.[14] For example, the Court's conclusion that §848 "reflects a comprehensive penalty structure, that leaves little opportunity for pyramiding of penalties from *other sections* of the Comprehensive Drug Abuse Prevention and Control Act of 1970", 432 U.S. at 156 (emphasis added), seems to indicate that all other provisions of the Act, substantive as well as conspiratorial, merge within the inclusive ambit of §848.

Our reading of Justice Blackmun's plurality opinion in *Jeffers* leads us to conclude that only cumulative punishment for conspiracy violations is prohibited, and that cumulative punishment for substantive offenses and a continuing criminal enterprise under §848 does not violate the double jeopardy clause. Justice Blackmun explicitly recognized the propriety of charging substantive crimes and conspiracies separately, but held that there were no equally valid policy reasons for charging conspiracies and continuing criminal enterprises separately. 432 U.S. at 157. Absent explicit language to the contrary, we adhere to the well established view that conspiracy statutes do not foreclose punishment for substantive offenses. We see no reason to assume that §848 is intended to cover substantive violations.

This conclusion is consistent with our approach in *United States v. Barnes*, 604 F.2d 121, 155-56 (2 Cir. 1979), *cert. denied*, 446 U.S. 907 (1980). There we upheld the district court's decision not to impose sentence on the conspiracy count since the maximum statutory penalty had been imposed on the continuing criminal enterprise count; but we affirmed the sentences imposed for the various underlying subsantive offenses.

We vacate the sentences imposed on Mourad on the conspiracy counts (Counts 1 and 2, 21 U.S.C. §§846 and 963)[15] and we remand his case to the district court with directions to reconsider the sentence imposed under §848, keeping in mind that the district court may consider whether to increase the §848 sentence. *See McClain v. United States*, 643 F.2d 911 (2 Cir. 1981) (Van Graafeiland, J.). The lifetime special parole provisions imposed under

Counts 4, 5, 7, 10, 11 and 12 are not to be disturbed. *See United States v. Chagra*, 669 F.2d 241, 261-62, 266 (5 Cir.), *cert. denied*, __ U.S. __ (1982).

We have carefully considered all other claims of error raised by appellants and we find them to be without any merit whatsoever.

Appellants were convicted after a fair trial of serious offenses committed beginning five years ago. We order that the mandate issue forthwith.

All convictions are affirmed; the case of appellant Mourad is remanded solely for the purpose of reconsideration of his sentence in accordance with this opinion.

FOOTNOTES

1. Mourad was convicted of unlawfully, wilfully and knowingly importing, distributing and possessing with intent to distribute narcotics and conspiring to do the same, engaging in a continuing criminal enterprise, and travelling interstate and using interstate telephone communications to carry out narcotics traffic as charged in counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 15, in violation of 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 846, 848, 952, 960, 963 and 18 U.S.C. §§2, 1952 (1982).

Yacteen was convicted of unlawfully, wilfully and knowingly importing, distributing and possessing with intent to distribute narcotics and conspiring to do the same, and travelling interstate and using interstate telephonic communications to do so as charged in counts 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 15, in violation of 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 846, 952, 960, 963 and 18 U.S.C. §§ 2, 1952 (1982).

Hargrave was convicted of unlawfully, wilfully and knowingly importing, distributing and possessing with intent to distribute narcotics, conspiring to do the same, and using interstate telephone communications to do so as charged in counts 1, 2, 4, 5 and 15 in violation of 21 U.S.C. §§846, 963 (1982) and 18 U.S.C. §§2, 1952.

2. Hargrave's sentence also covered income tax charges filed against him in the District of New Jersey, to which he pleaded guilty before Judge Griesa pursuant to Fed.R.Crim.P.20.

3. For example, the government failed to turn over telephone books seized from Ghazali, one of the heroin couriers, until the night before he testified. Also, the prosecutor gave defense counsel a copy of a business card bearing the name and telephone number of an unindiced co-conspirator only one day before it was offered in evidence.

4. *E.g.*, 18 U.S.C. §3500 requires that the government produce relevant statements only *after* the witness has completed his direct examination.

5. Appellants assert various other claims of prosecutorial misconduct which clearly are without merit. The fact that a grand jury indictment is based solely on hearsay evidence does not automatically require its dismissal. *Costello v. United States*, 350 U.S. 359 (1956). Similarly, the court properly overruled defense counsel's objection to a handwriting expert's testimony. The prosecutor informed defense counsel the previous day of the likelihood of such testimony, but did not produce the report at that time because it was not completed until that night. The expert had not been engaged until well into the trial.

6. Hargrave called his wife following his indictment for income tax violations and told her to "only call 'Mr. T,' call it my way." Other evidence established that the "Mr. T." referred to was appellant Tamer Trad Mourad. The two agents were in the same room. They stood approximately four and six feet from Hargrave during the telephone conversation. Hargrave's careful choice of words indicates that he knew that the agents were listening and that his conversation was not confidential.

7. Hargrave's claim that the agents violated his Fourth Amendment rights was raised in the district court and therefore is not properly before us. *United States v. Fuentes*, 563 F.2d 527, 531 (2 Cir.), *cert. denied*, 434 U.S. 959 (1977).

8. Since the law does not permit conviction for a lesser included offense if proof of the greater offense necessarily involves proof of the lesser, *Blockburger v. United States*, 284 U.S. 299 (1932); *Gavieres v. United States*, 220 U.S. 338 (1911), a conviction and sentence imposed for a lesser included offense must be vacated when there has been a conviction for the greater offense. *United States v. Rosenthal*, 454 F.2d 1252, 1255 (2 Cir.), *cert. denied*, 406 U.S. 931 (1972).

9. *Jeffers* arose in a different context than *Whalen v. United States*, 445 U.S. 684 (1980), or the instant case. The grand jury returned two indictments against Jeffers, one charging violation of §846 and the other charging violation of §846 and the other charging violation of §848. The conspiracy indictment charged the same predicate offenses and involved the same time period as the continuing criminal enterprise indictment. The defendant op-

posed consolidation on the grounds that the parties charged in the two indictments differed and much of the §846 evidence would be inadmissible on the §848 charge. The court denied the motion to consolidate.

The defendant first was tried on the §846 indictment and was found guilty. A motion to dismiss the §848 indictment on the ground of double jeopardy was denied. After trial of the §848 indictment, the defendant was found guilty; he was sentenced to life imprisonment and the maximum fine was imposed.

The Supreme Court held that the defendant had waived his double jeopardy claim by opposing consolidation of the trials. 432 U.S. at 152. This conclusion was challenged by the dissent.

10. *E.g., United States v. Smith*, 690 F.2d 748, 750 (9 Cir. 1982), *cert. denied*, __ U.S. __ (1983); *United States v. Chagra*, 669 F.2d 241, 261-62 (5 Cir.), *cert. denied*, __ U.S. __ (1982); *United States v. Chagra*, 653 F.2d 26, 32-34 (1 Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); *United States v. Barnes*, 604 F.2d 121, 155-56 (2 Cir. 1979), *cert. denied*, 446 U.S. 907 (1980); *United States v. Valenzuela*, 596 F.2d 1361, 1364-65 (9 Cir.), *cert. denied*, 444 U.S. 865 (1979).

11. Justice Blackmun's lengthy defense of the reasonableness of such an interpretation, however, makes it clear that the Court did not wholly disregard that issue.

12. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Court held that the Fifth Amendment guarantee against double jeopardy prohibits three separate actions: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.

13. We reject the government's contention that *Jeffers* meant only to address §846. There is no logical reason to single out §846 conspiracies from others under the Act.

14. This interpretation is followed by the Fifth Circuit, *United States v. Chagra, supra* note 10, 669 F.2d at 261-62, and the Third Circuit, *United States v. Gomberg, supra*, 715 F.2d at 851.

15. Mourad was sentenced as follows:

Group	*Count*	*Statute*	*Sentence*
A	3	21 U.S.C. §848	40 years+$50,000
B	2	21 U.S.C. §963	15 years+$25,000
B	4	21 U.S.C. §§952,960 18 U.S.C. §2	10 years+$25,000*
B	7	21 U.S.C. §§952,960 18 U.S.C. §2	10 years*
B	10	21 U.S.C. §§952,960 18 U.S.C. §2	10 years*
C	1	21 U.S.C. §846	15 years
C	5	21 U.S.C. §846 18 U.S.C. §2	10 years*
C	8	21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A) 18 U.S.C. §2	10 years*
C	11	21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A) 18 U.S.C. §2	5 years*
C	12	21 U.S.C. §§812, 841(a)(1) 841(b)(1)(A)	5 years*
D	6	18 U.S.C. §§1952, 2	5 years
D	9	18 U.S.C. §§1952, 2	5 years
D	13	18 U.S.C. §§1952, 2	5 years
D	15	18 U.S.C. §§1952, 2	5 years

* Plus lifetime special parole.

APPENDIX "B"

Title 18, U.S.C. §1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

Title 21 U.S.C. §841. Prohibited acts

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have been final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

Title 21 U.S.C. §846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub. L. 91-513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265).

Title 21 U.S.C. §848. Continuing criminal enterprise

Penalties; forfeitures

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Continuing criminal enterprise defined

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Suspension of sentence and probation prohibited

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and theAct of July 15, 1932 (D.C.Code, secs. 24-203 to 24-207), shall not apply.

Title 21, U.S.C. §952. Importation of controlled substances

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that . . . .

Title 21 U.S.C. §960. Prohibited acts

Unlawful acts

(a) Any person who—

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures or distributes a controlled substance,

shall be punished as provided in subsection (b) of this section.

Penalties

(b)(1) In the case of a violation under subsection (a) of this section with respect to a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than $25,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.

(2) In the case of a violation under subsection (a) of this section with respect to a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not

more than five years, or be fined not more than $15,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special parole term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in schedule IV.

Special parole term

(c) A special parole term imposed under this section or section 962 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. The special term provided for in this section and in section 962 of this title is in addition to, and not in lieu of, any other parole provided for by law.

Title 21, U.S.C. §963. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

APPENDIX "C"—SENTENCING CHART

Group	*Count*	*Statute*	*Sentence*
A	3	21 U.S.C. § 848	40 years + $50,000
B	2	21 U.S.C. §963	15 years + $25,000
B	4	21 U.S.C. §§952, 960 18 U.S.C. §2	10 years + $25,000*
B	7	21 U.S.C. §§952, 960 18 U.S.C. §2	10 years*
B	10	21 U.S.C. §§952, 960 18 U.S.C. §2	10 years*
C	1	21 U.S.C. §846	15 years
C	5	21 U.S.C. §846 18 U.S.C. §2	10 years*
C	8	21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A) 18 U.S.C. §2	10 years*
C	11	21 U.S.C. §§812 841(a)(1), 841(b)(1)(A) 18 U.S.C. §2	5 years*
C	12	21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A) 18 U.S.C. §2	5 years*
C	8	21 U.S.C. §§812, 841(a)(1) 841(b)(1)(A) 18 U.S.C. §2	10 years*
C	11	21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 18 U.S.C. §2	5 years*
C	12	21 U.S.C. §§812, 841(a)(1) 841(b)(1)(A) 18 U.S.C. §2	5 years*
D	6	18 U.S.C. §§1952, 2	5 years
D	9	18 U.S.C. §§1952, 2	5 years
D	13	18 U.S.C. §§1952, 2	5 years
D	15	18 U.S.C. §§1952, 2	5 years

* Plus special lifetime parole.

APPENDIX "D"
REQUEST NO. 2
CONTINUING CRIMINAL ENTERPRISE

[To be delivered after definitions of other crimes charged in the indictment].

The federal criminal laws also make it unlawful for a person to engage in a continuing criminal enterprise or in a series of violations of the Controlled Substances Act of 1971 in concert with five or more other persons with respect to whom one occupies a supervisory or managerial position and obtains substantial income.

Count 3 of the indictment is asserted against only the defendant Tamer Mourad. Before you can find the defendant Mourad guilty of the crime charged in the third count of the indictment you must be convinced beyond a reasonable doubt that the government has proved the following elements:

First, that the defendant Tamer Mourad committed at least three of the offenses charged in counts 4, 7, 9, 10, 13, 15, and 16 of this indictment. Those counts, as you will hear, charge specific substantive offenses in April 1981, March 1982, and June 1982 by Tamer Mourad and other defendants as I have previously described.

Second, that the offenses charged in the counts I have just described of this indictment are part of a continuing series of violations of the defendant Mourad of the federal narcotic laws as contained in the Drug Abuse Prevention and Control Act of 1970.

Third, that the defendant Mourad undertook to commit at least three such offenses in concert with five or more other persons, either named or unnamed in the indictment.

Fourth, that the defendant Mourad occupied a position of organizer, a supervisory position or other position of management with respect to such five or more other persons.

The fifth and last essential element is: proof beyond a reasonable doubt that from the continuing series of violations, if such you so find, that the defendant Mourad obtained substantial income or resources.

Now, I have already discussed the first element, which is you must be satisfied that Mr. Mourad is guilty under counts [as enumerated above] but with regard to the second and third elements of proof here in count 3, in simple terms, as I am sure you understand, the prosecution contends from the evidence that they have shown a continuing series of transactions, at least three in number, either to possess narcotics with intent to distribute or to import narcotics by five or more persons to whom the defendant Mourad had a relationship which I will describe in a moment.

The fourth essential element concerns that relationship. The fourth element requires proof beyond a reasonable doubt that Mr. Mourad is an organizer, manager or person in a supervisory position. Let me say that in this connection an organizer can be defined as a person who puts together a number of people engaged in separate activities and arranges them in their activities in one essentially orderly operation or

enterprise. The supervisory position, as that phrase is used under the statute, can be defined as one who manages or directs or oversees the activities of others.

In this regard, it would be insufficient to support a conviction on this count if all you were to determine was that Mr. Mourad simply sold heroin to other people on a haphazard basis. On the other hand, if you found that Mr. Mourad had a vast network of purchasers and sources of immense supply, it would reveal his function to be an organizer, supervisor, or manager. *See United States v. Mannino*, 635 F.2d 110, 117 (2d Cir. 1980).

More specifically, you must find beyond a reasonable doubt that Mr. Mourad had individual relations of control with at least five persons in order to conclude that he fulfilled the supervisory role. (*Id.*)

Let me also take up with you some of the definitions which may be important under the fifth element which is that Mr. Mourad has to be shown to have substantial income or resources from illicit trafficking in heroin. First of all, I pointed out to you that in the context of this count and the underlying statute substantial means something that is real or actual. Furthermore, the word substantial connotes something having considerable or ample size or value.

Finally, I instruct you that the word income here can be simply defined as money or other material resources received or gained from illegal narcotics transactions.

I instruct you also that that does not mean net income. From what I have already said it follows that

the phrase "substantial income" in this kind of charge should be construed as far as possible in an objective manner; that is to say, in order to support a conviction under count 3 you should find that Mr. Mourad received what any reasonable person would consider considerable or ample funds from trafficking in heroin as an organizer or supervisor or manager. Put differently, it would be insufficient to support a conviction here on this count if all you were to determine was that Mr. Mourad obtained an occasional moderate sum of money or resources in connection with any importation or possession of heroin with intent to distribute it.

Adapted from the charge in *United States v. Sperling,* 506 F.2d 1323 (2d Cir. 1975), *cert. denied,* 420 U.S. 962, as set out in Devitt and Blackmar, Federal Jury Practice and Instructions, p. 470. *See also United States v. Mannino, supra.*

APPENDIX "E"
EXCERPTS FROM TRANSCRIPT OF TRIAL

[4733]

*** of a continuing series of violations in which the defendant acts in concert with five or more other persons with respect to whom the defendant occupies a position of organizer, a supervisory position or any other position of management, and from which activity the defendant obtains substantial income or resources, then the defendant is guilty of engaging in a continuing criminal enterprise.

Now, the concepts which are involved in this charge, which were not involved in any of the charges before presented to you, are the concept of the continuing series of violations, the concept of acting in concert with five or more other persons, the concept of occupying a role of responsibility within the terms I have stated to you, and the concept of deriving substantial income or resources. This means that you need to find several things in order to convict Mourad on count 3.

However, if you take the concepts one by one, as I have indicated to you, you will realize that they have a common sense meaning and are not technical or abstruse.

Now, let me restate this in terms of the elements you must find in order to convict Mourad on count 3. In order to so convict you must find that the government has proven beyond a reasonable doubt each of the following elements:

One, that Mourad committed at least one of the

[4734]

substantive offenses charged in the indictment charging procuring the importation of heroin or attempting to possess heroin with intent to distribute or possessing heroin with intent to distribute or distributing heroin.

Now, you know the substantive counts I am speaking of. I refer to counts—you can just list these down the margin if you want to—4, 5, 7, 8, 10, 11, 12.

So the first element is you simply have to find, before you go any farther, that the defendant Mourad committed one of the crimes charged in those counts.

Now, the second element is, if you find that, you have to find in order to convict that this violation was part of a continuing series of violations of the federal statutory provisions making it a crime to import heroin or distribute heroin or possess heroin with intent to distribute or attempt or aid and abet any such activities. You see at the bottom of page 5 the phrase "which violations were part of a continuing series of violations." So that's listed in the indictment.

Now, the third element that you must find is, if you find the first two, that this continuing series of violations was undertaken by Mourad in concert with five or more other persons with respect to whom Mourad occupied a position of organizer, a supervisory position or any other position of management.

[4735]

You see up at the top of page 6 "organizer, supervisor and manager." That's a kind of shorthand for

what I have told you just now.

The fourth element that must be proved is that Mourad obtained substantial income or resources from this continuing series of violations.

Now, what's meant by a continuing series of violations. It must obviously be more than one. I instruct you that it must be at least three. Aside from that requirement, it is up to you to use your understanding of the meaning of plain English words and determine whether there was a continuing series of violations.

The word violations refers to the substantive offenses of procuring the importation of heroin, attempting to possess heroin with intent to distribute, possessing heroin with intent to distribute or distributing heroin, the kinds of things we have talked about in the earlier part of the charge. Those are substantive offenses under the statute. Those would be violations within the meaning of this language. And by now you know what it is to commit each of those crimes, you know what it takes to commit those crimes.

Now, in considering whether Mourad was guilty of a continuing series of violations you will consider all the evidence in the case, not just the evidence about

[4736]

the substantive counts in the indictment. In other words, in connection with this requirement of continuing series you consider all the evidence, not just the evidence underlying particular substantive counts. In other words, you will consider all the evidence in the case, that is, the evidence relating to the substantive

counts I enumerated and also all the other evidence, and determine whether Mourad was guilty of a continuing series of violations of the kind I have defined to you. It's up to you to consider all the evidence and determine whether that element is proved.

Now, the third element requires you to find, in order to convict Mourad on this count, that this continuing series of violations was undertaken by Mourad in concert with five or more other persons with respect to whom Mourad occupied a position of organizer, a supervisory position or any other position of management.

Just a few instructions are necessary. It is not necessary that the five or more persons be named as defendants in this case, nor is it necessary that the defendant Mourad have dealt with the five persons together at one time.

Now, with regard to the meaning of the position of organizer, a supervisory position or any other position of management, these terms again are ordinary English words, ***

[4796]

MR. BORNSTEIN: Your Honor, I am obligated under Rule 30—

THE COURT: Let's move on, please.

MR. BORNSTEIN: I object to the description of plain meaning of continuing series and a failure to define.

I object to the phrase used that the jury may consider all evidence in determining whether or not—

THE COURT: We have discussed this before.

MR. BORNSTEIN: Your Honor, I have to note this for the record.

THE COURT: I would like to have the jury able to deliberate now.

MR. BORNSTEIN: Your Honor, I just have to note this for the record.

THE COURT: All right. I assume that you object, because we discussed this before, to allowing the jury to consider all the evidence on the series of violations.

MR. BORNSTEIN: Your Honor, I will be through within two or three minutes at most.

THE COURT: All right.

MR. BORNSTEIN: I object specifically to the phrase "all evidence" without specifying the particular violations.

So that my grounds are clear, the government has specified a series of violations. It has been my position

[4797]

that it has to be the violations charged in the indictment for the reasons given previously when we had our charging conference. I object specifically to the phrase "all evidence."

I object to the inclusion of the false statement charge.

MS. PATTERSON: Is that the false exculpatory statement charge?

MR. BORNSTEIN: Yes, ma'am. With regard to the failure to call witnesses charge, I object to the phrase "all parties are entitled to call witnesses," and I object to the court's failure to mention the issue of control of a witness as a factor to be considered.

THE COURT: We discussed that before. Our positions are on the record.

MR. BORNSTEIN: Under the court's charge of credibility of witnesses, I object to the court's failure to mention prior criminal record as a factor to be considered in impeachment. I specifically requested appropriate language in my requests.

With regard to the falsus in uno falsus in omnibus, I object to the court's failure to include the language with regard to the jury's failure—if the jury finds that a witness has testified falsely deliberately or has wilfully testified falsely, that language was not
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No. 83-2067

In the Supreme Court of the United States

OCTOBER TERM, 1984

TAMER MOURAD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's sentence for engaging in a continuing criminal enterprise and for various substantive charges that served as predicate offenses for the continuing criminal enterprise count violates the Double Jeopardy Clause.

2. Whether the district court's instructions to the jury on the "continuing series of violations" element of the continuing criminal enterprise count were erroneous.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 729 F.2d 195.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1984. A petition for rehearing was denied on April 18, 1984. The petition for a writ of certiorari was filed on June 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a two-month trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count (count 3) of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848 (designated in the courts below as the Group A count); one count (count 2) of conspiracy to import heroin

and three substantive counts (counts 4, 7, and 10) of importation of heroin, in violation of 21 U.S.C. 952, 960, 963 and 18 U.S.C. 2 (the Group B counts); one count (count 1) of conspiracy to distribute heroin and four substantive counts (counts 5, 8, 11, and 12) of distribution of heroin, in violation of 21 U.S.C. 812, 841, 846 and 18 U.S.C. 2 (the Group C counts); and four counts (counts 6, 9, 13, and 15) of travel in interstate commerce and use of interstate facilities to promote and facilitate drug offenses, in violation of 18 U.S.C. 1952 and 2 (the Group D counts). On the CCE count, he was sentenced to a term of 40 years' imprisonment and a fine of $50,000; on the Group B importation counts, a total term of 45 years' imprisonment, concurrent with the CCE sentence, and a fine of $50,000; on the Group C distribution counts, a total term of 45 years' imprisonment, concurrent with the above sentences; and on the Group D Travel Act offenses, a total term of 20 years' imprisonment, concurrent with the above sentences. In addition, on the substantive importation and distribution counts, petitioner received a lifetime term of special parole. See Pet. App. 20a. The court of appeals affirmed petitioner's convictions in all respects; however, it vacated the sentences on the importation conspiracy and distribution conspiracy counts under *Jeffers* v. *United States*, 432 U.S. 137 (1977), and remanded for the district court to consider whether to increase petitioner's sentence on the CCE count in light of the vacation of the conspiracy sentences (Pet. App. 1a-20a).[1]

1. The defendants in this prosecution "were high ranking figures in an international narcotics smuggling operation that transported a continuous flow of large quantities of

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[1]Petitioner's original aggregate sentence was 45 years' imprisonment, a $100,000 fine, and a lifetime term of special parole; as a result of the court of appeals' decision — subject to petitioner's resentencing by the district court — his sentence is 40 years' imprisonment, a fine of $75,000, and lifetime special parole.

heroin from Lebanon to the United States over a four year period" (Pet. App. 3a). Petitioner, "a Lebanese national, directed the movement of heroin into the United States from Lebanon" (*ibid.*).

The extensive evidence at trial may be summarized as follows. In 1979, petitioner, then residing in Massachusetts, traveled with co-defendant Joseph Hargrave to Lebanon and met with Jamil Hameiah, a refiner of heroin (Tr. 605-608). Hameiah introduced petitioner and Hargrave to Mohamed Berro, a former Lebanese customs official, and Berro's son, Nassif. Mohamed Berro agreed to transport multi-kilogram loads of heroin to petitioner and Hargrave. In addition, the parties agreed to form an export-import company, with offices in New York City and Beirut, which would be used to launder drug proceeds and serve as a cover for the frequent trips to Lebanon contemplated by petitioner and Hargrave. Tr. 613-625. Following the meeting, Nassif Berro obtained from Hameiah a suitcase containing four kilograms of heroin and delivered it to his father in Beirut. Mohamed Berro arranged for an airline pilot to deliver the suitcase to New York. Upon his arrival in New York City, the pilot met with petitioner and gave him the suitcase, retaining one kilogram because petitioner's payment was less than the full amount. Tr. 630-636. Several weeks later, petitioner met Mohamed Berro in Beirut and explained that he had been unable to make the complete payment because Hargrave was concerned that the police were watching them. Petitioner assured Berro that he would be paid for the additional kilogram. Tr. 636-637.

A week later, petitioner, while still in Beirut, told Mohamed Berro that he had purchased four more kilograms of heroin from Hameiah. With Berro's assistance, the heroin was delivered to a relative of petitioner's who resided in Los Angeles. Tr. 637-640. In the fall of 1979, petitioner paid Mohamed Berro $90,000 for his help (Tr. 637-641).

In March 1980, petitioner and Hargrave made another trip to Lebanon. There, they met with petitioner's long-time friend, Mahmoud Yaghi, who arranged for them to transfer $200,000 to a Lebanese banker. Tr. 1254-1258, 1266-1267. Aware of petitioner's complaints about the quality of the heroin furnished by Hameiah, Yaghi introduced petitioner and Hargrave to another source, Suhayl Makkouk. Petitioner and Hargrave were shown 100 kilograms of raw heroin but were told that it could not be processed until Makkouk received necessary chemicals from France. Makkouk agreed to notify petitioner when the refining of the heroin had been completed. Tr. 1260-1265.

In February 1981, Yaghi delivered a sample of Makkouk's heroin to petitioner and Hargrave in New York (Tr. 1281-1282). While in New York, Yaghi witnessed two heroin transactions involving petitioner and Hargrave. One involved a partial payment to petitioner and Hargrave for the sale of six kilograms of heroin furnished by Hameiah; the other concerned the delivery to petitioner and Hargrave of two kilograms of heroin by two individuals, one of whom was a Jordanian steward (Tr. 1293-1294, 1303-1305).

In April 1981, petitioner, accompanied by co-defendant Adnan Yacteen, traveled to Lebanon to meet with Yaghi and arranged for two kilograms of heroin to be smuggled to New York. The courier designated to deliver the heroin was Charles Hunn, a Swiss National. On April 16, Hunn, carrying a false-bottomed suitcase containing heroin, and Yaghi arrived in New York. Yaghi, after losing sight of Hunn in the customs area, proceeded to check into a nearby hotel room and telephoned petitioner to report his arrival. Tr. 1306-1321.

Unbeknownst to Yaghi, Hunn had been detained because customs officials had detected the heroin in his suitcase. Hunn agreed to cooperate with the authorities by making a

controlled delivery. The next day, petitioner and Yacteen drove Yaghi to the hotel where Hunn was staying. Yaghi was arrested when he sought to claim the suitcase from Hunn. Petitioner drove off and escaped detection. Tr. 1306-1321, 1493-1495.

In October 1981, Hameiah dispatched another courier with a false-bottomed suitcase to transport two kilograms of heroin from Lebanon to petitioner. The drugs concealed in the suitcase were discovered in London, but the customs officials permitted the suitcase to be taken to New York. The courier was arrested in New York when he attempted to claim the suitcase. Tr. 1104-1108, 1116-1117.

Additional shipments of heroin were imported by petitioner and Hargrave from Lebanon in 1982. In February, four and one-half kilograms were smuggled without incident (Tr. 2462-2471). In mid-March, a female courier was detected at Kennedy Airport in New York carrying more than two kilograms of heroin intended for delivery to petitioner (Tr. 681-684). In June, petitioner received a shipment of heroin and distributed a portion to Nassif Berro and Berro's associate for resale in New York City; the two dealers were arrested when they attempted to sell the heroin to an undercover DEA agent. Tr. 704, 709-710, 713.

On November 7, 1982, DEA agents, acting pursuant to a warrant, searched petitioner's home in Massachusetts. They discovered one pound of unrefined heroin, quantities of hashish and marijuana, drug paraphernalia, a ledger in which drug transactions had been recorded, and $26,000 in cash (Tr. 81; GX 1-6, 10). Petitioner was arrested and taken to a house of detention to await removal proceedings. While there, petitioner engaged in a lengthy conversation with another inmate in which he described his involvement in drug activities and boasted of his extravagant lifestyle based on the proceeds of his trafficking in narcotics. Petitioner

also revealed a plan to kidnap and torture Mohamed Berro in Lebanon in order to force Nassif Berro, who was cooperating with federal officials after his arrest in New York City, to recant. Tr. 2187-2190, 2210-2214.

2. In its instructions to the jury on the CCE count, the district court summarized the statute and the indictment (Tr. 4705, 4732) and then defined each of the elements of the offense (Tr. 4732-4736). In particular, the court stated that, in order for the jury to convict petitioner on the CCE count, it had to find that he had committed one of the seven substantive importation or distribution felonies charged in the indictment, that the violation was part of a continuing series of drug violations, and that this continuing series of violations provided petitioner with substantial income or resources and was undertaken by petitioner in concert with five or more persons with respect to whom he occupied a managerial or supervisory position (Tr. 4732-4733). The court specifically advised the jury that the term "continuing series of violations" had not previously been covered in the earlier instructions on the other drug offenses (Tr. 4733), and it explained (Tr. 4734, 4735):

> Now, the second element is, if you find that [petitioner committed one of the charged substantive offenses], you have to find in order to convict that this violation was part of a continuing series of violations of the federal statutory provisions.
>
> * * * * *
>
> Now, what's meant by a continuing series of violations. It must obviously be more than one. I instruct you that it must be at least three. Aside from that requirement, it is up to you to use your understanding of the meaning of plain English words and determine whether there was a continuing series of violations.

Petitioner's general objection to this instruction on the "continuing series of violations" element was denied by the district court (Tr. 4795, 4796).

3. The court of appeals affirmed petitioner's convictions (Pet. App. 1a-20a). The court summarily rejected his challenge to the "continuing series of violations" instruction, noting that it had "carefully considered" that and other arguments and found "them to be without any merit whatsoever" (*id.* at 16a).

With respect to petitioner's sentence, the court vacated his punishment on the two drug conspiracy counts in light of *Jeffers* v. *United States*, 432 U.S. 137 (1977) (Pet. App. 15a). However, it rejected his contention that cumulative penalties for CCE and for the substantive crimes that serve as predicate offenses for the CCE count violate the Double Jeopardy Clause (*id.* at 13a-15a). In view of its vacation of the penalties on the conspiracy counts, the court remanded the case to the district court "to reconsider the sentence imposed under § 848 [on the CCE count], keeping in mind that the district court may consider whether to increase the § 848 sentence" (*id.* at 15a; see also *id.* at 16a).

ARGUMENT

1. Petitioner contends (Pet. 5-10) that, under the Double Jeopardy Clause, he could not be sentenced for both the CCE offense and the substantive drug offenses that constituted the predicate violations for the CCE count. That issue is addressed in our brief in opposition (at 14-18) in *Garrett* v. *United States*, cert. granted, No. 83-1842 (Oct. 1, 1984), a copy of which is being sent to counsel for petitioner.

Notwithstanding the grant of certiorari in *Garrett*, we submit that the instant petition should not be held pending decision in that case. Because the court of appeals has remanded for resentencing on the CCE count, the case is currently interlocutory in much the same way that it would

be if the district court had sentenced petitioner for the substantive drug offenses but had not yet imposed sentence for CCE. Cf. *Berman* v. *United States*, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment"). In order to avoid piecemeal review (cf. *Flanagan* v. *United States*, No. 82-374 (Feb. 21, 1984), slip op. 4-6), petitioner should be required to present this issue to the Court, together with any other claims he may have, after the resentencing proceeding has occurred in the district court.

Moreover, petitioner's resentencing could significantly affect the nature of the issue that he seeks to raise. If, as would be permissible under the remand order,[2] the district court increased the fine on the CCE count to $100,000 (which is the maximum amount authorized by statute, see 21 U.S.C. 848(a)(1)) and made the sentences on the remaining counts run concurrently with the CCE sentence, petitioner would be subject to no greater term of imprisonment or fine than was originally imposed. However, in light of the resentence, his double jeopardy challenge would relate to the propriety of *concurrent* sentences on the substantive and CCE counts rather than, as now, *consecutive* sentences. In this respect, the case differs from *Garrett*, where resentencing on the CCE count could not have resulted in the same incarceration and fine that the defendant initially received (see *Garrett* Br. in Opp. 17-18 & n.17). Thus, since the resentencing proceeding could materially alter the nature of the issue, review at this time would be unwarranted.[3]

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[2]See also *Garrett* Br. in Opp. 16 & n.14.

[3]Because the CCE statute does not authorize a term of special parole, resentencing on the CCE count as discussed in the text could not re-impose the special parole term that petitioner was given on the substantive counts. The petition makes no mention of this issue of special parole, and any concern that petitioner might assert with respect

Even apart from the remand for resentencing, resolution of petitioner's double jeopardy claim in his favor would not necessarily change his overall sentence in any way. As noted in our brief in opposition in *Garrett* (at 9 & n.3), and as the district court charged the jury in this case (see page 6, *supra*) in an instruction that petitioner neither challenged in the lower courts nor contests in this Court, the "series" element of CCE requires that there be three predicate drug offenses. Here, however, petitioner was convicted on seven substantive drug counts. Thus, even if the punishments on three of those seven counts are vacated — and such relief seems the most that the "multiple punishment" component of the Double Jeopardy Clause could require — petitioner's aggregate sentence on the remaining four substantive counts and the CCE count would be unaltered. For example, if the sentences on counts 8, 11, and 12 were set aside (see Pet. App. 20a), his total sentence would be, as it now is (see page 2 note 1, *supra*), a term of 40 years' imprisonment, a fine of $75,000, and a lifetime term of special parole. More generally, this will be true if the sentences on counts 3 (CCE) and 4 (substantive importation) are left standing and any three of the six sentences on the other substantive drug counts are vacated. Disposition of the double jeopardy issue in petitioner's favor would, therefore, be entirely academic.

Accordingly, we submit that the consideration of the first question presented by petitioner should not be deferred pending the Court's decision in *Garrett*. If after resentencing petitioner has a colorable claim of illegality, it may be considered by the court of appeals in light of the revised sentence and, if it is by then available, this Court's decision in *Garrett*.

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to special parole at the expiration of his lengthy CCE sentence would be both premature and speculative at this stage. In any event, as discussed below, petitioner's special parole term would not be improper even if he prevailed on his double jeopardy argument.

2. Petitioner also challenges (Pet. 10-16) the district court's instruction on the "continuing series of violations" element of the CCE offense. He does not deny that the district court advised the jury on several occasions that this is an element of the offense and had to be proven by the government beyond a reasonable doubt. Nor does he contest the court's instruction that a "series" means three or more violations. Rather, he contends (Pet. i) that the court's charge had to "instruct the jury that those violations must be related" in order for the "continuing series of violations" element to be met.

It was not reversible error for the district court to instruct the jury that, in considering whether the series of violations was "continuing," it was "to use [its] understanding of the meaning of plain English words" (Tr. 4735). In general, "[t]he words and phrases in the [CCE] statute are neither outside the common understanding of a juror, nor so technical or so ambiguous as to require a specific definition." *United States* v. *Johnson*, 575 F.2d 1347, 1357-1358 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979) (citations omitted). The word "continuing" is not beyond the common understanding of jurors and adequately imparts, without further elaboration, the substance of the statutory element. See also *United States* v. *Nerone*, 563 F.2d 836, 844 n.4 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978) (approving instruction under 18 U.S.C. 1955 that statutory words "substantially continuous operation" should "be given their normal and customary meaning. What constitutes 'substantially continuous operation' is a question for you to decide"). In these circumstances, more specific instructions were not required. See *United States* v. *Marino*, 639 F.2d 882, 888 (2d Cir.), cert. denied, 454 U.S. 825 (1981); *United States* v. *Smith*, 635 F.2d 716, 720 (8th Cir. 1980); *United States* v. *Crockett*, 506 F.2d 759, 762 (5th Cir.), cert. denied, 423 U.S. 824 (1975); *United States* v. *Maude*, 481

F.2d 1062, 1075 (D.C. Cir. 1973); *Evans* v. *United States*, 349 F.2d 653, 658-659 (5th Cir. 1965).[4]

Moreover, the absence of a more particularized instruction could not have resulted in prejudice to petitioner. As petitioner appears to recognize in complaining about another portion of the instructions (Pet. 15-16),[5] the evidence of petitioner's numerous drug crimes, and the jury's verdict of guilty on those charges, clearly establishes that there was a "continuing series of violations." The verdict in this case plainly reflects the jury's conclusion that petitioner's drug trafficking involved "ongoing criminal activity." *United States* v. *Losada*, 674 F.2d 167, 173 (2d Cir.), cert. denied, 457 U.S. 1125 (1982). Thus, even assuming that "situations might exist which would indicate that a jury should be aided by definition of the words in this statute, [6] it was not error to refuse to do so in the straightforward

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[4]The cases upon which petitioner relies (Pet. 10-12) are not to the contrary. While those decisions indicate that the statutory term "continuing series" conveys the notion of related violations, they do not hold that a district court is required as a matter of law to explicate that element of the offense or that it is reversible error for the court to refer the jury to the commonly understood meaning of the phrase "continuing series."

[5]Contrary to petitioner's contention, the district court correctly instructed the jury that, in determining whether there was a "series of violations," it was entitled to consider all of the evidence in the case and was not limited to the offenses charged in the substantive counts of the indictment. See *United States* v. *Sterling*, No. 82-1640 (9th Cir. Sept. 10, 1984), slip op. 3959; *Sperling* v. *United States*, 692 F.2d 223, 226 (2d Cir. 1982), cert. denied, No. 82-1391 (June 20, 1983); *United States* v. *Lurz*, 666 F.2d 69, 78 (4th Cir. 1981), cert. denied, 455 U.S. 1005, 457 U.S. 1136, 459 U.S. 843 (1982); *United States* v. *Sperling*, 506 F.2d 1323, 1344 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975).

[6]Of course, petitioner can challenge the instructions only in the context of his case and not as they might be applied in other circumstances. See *New York* v. *Ferber*, 458 U.S. 747, 767 (1982); *United States* v. *Raines*, 362 U.S. 17, 21 (1960).

context of this case." *United States* v. *Johnson*, 575 F.2d at 1358.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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STEPHEN S. TROTT
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OCTOBER 1984

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[7]We also point out that the proposed instruction requested by petitioner —that "it would be insufficient to support a conviction on [the CCE] count if all you were to determine was that [petitioner] sold heroin to other people on a haphazard basis" (Pet. App. 30a) — was submitted in connection with the "organizer" element of the offense and not the "continuing series" element (see *id.* at 29a-30a). In any event, as discussed above, it was clear to the jury under the court's instructions that petitioner could not be convicted of CCE for "haphazard" criminal activity, and its verdict shows that it found that petitioner had engaged in ongoing drug trafficking.

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